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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHRISTOPHER BOYD, Plaintiff and Appellant, v. EMBARCADERO MEDIA, INC., et al., Defendants and Respondents.	H048469 (Santa Clara County Super. Ct. No. 19CV355482)

In 2018, appellant Christopher Boyd was a candidate for a seat on the board of the Palo Alto Unified School District. Respondent Embarcadero Media, Inc. (Embarcadero) publishes the Palo Alto Weekly, a print newspaper distributed to Palo Alto residents, and its digital counterpart, Palo Alto Online (collectively, the Paper). Respondent William (sued as Bill) Johnson is Embarcadero's founder. The Paper, in both its print and digital forms, provides the Palo Alto community with local news and information, along with editorials that cover a range of topics, including civic and political news and commentary.

Upon learning of Boyd's school-board candidacy, the Paper investigated him and conducted an endorsement interview, and then published an article in

September and an editorial in October of 2018, about him. Both pieces said Boyd had falsely claimed that the educational organization of which he was the self-described "director"—Insted—was a non-profit, tax-exempt entity under 26 U.S.C. section 501(c)3 (section 501(c)3). The Paper also withdrew its invitation to Boyd to participate in a public-debate forum among the board candidates, of which the Paper was a sponsor, when he did not sufficiently explain the discrepancies about Insted the Paper had identified.

Boyd sued respondents Embarcadero and Johnson for defamation and related causes of action. They responded by filing a motion under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] Boyd opposed the motion but offered no evidence to refute the showing made in the moving papers. The trial court granted the motion, concluding respondents had shown that Boyd's claims arose from protected activity—news reporting on an election candidate—shifting the burden to Boyd to show, with admissible evidence, a probability of prevailing on his claims. As Boyd offered no evidence in opposition to the motion, the trial court concluded he had necessarily failed to meet that burden.

Boyd appeals, contending he offered proof to support his claims and requesting a further opportunity to do so on remand. As no such evidence appears in the record, and because he did not preserve any claim for additional evidentiary consideration, we affirm.

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[1] " 'SLAPP' is an acronym for 'strategic lawsuit against public participation.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1 (*Baral*).) Further unspecified statutory references are to the Code of Civil Procedure.

STATEMENT OF THE CASE

I. *Background Facts and the Paper's Statements About Boyd*[2]

In connection with Boyd's candidacy for a seat on the local school board and its regular editorial endorsement process, the Paper sought to interview Boyd and began probing online information on him, including from his LinkedIn page and from the website for an entity called "Insted," where Boyd was referred to as its "director." Insted was described as "an experimental after-school program" in which "post-doctoral students from Stanford University

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[2] We take the background facts from the amended complaint and the papers filed in connection with the anti-SLAPP motion. To the extent Boyd's respondent's brief contains factual statements, quotes, internet links, or references to documents without support in or citation to the record, we disregard them. We recognize that Boyd represents himself on appeal, as he did in the trial court, and whenever possible, we will not strictly apply technical rules of procedure in a manner that deprives self-represented litigants of a hearing. But Boyd is still bound by the many rules of appellate procedure designed to facilitate our review of claims of reversible error. We are required to apply these rules to a self-represented litigant's claims on appeal just as we would to those litigants who are represented by counsel. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247 [self-represented litigant held to the same restrictive rules as an attorney and is not entitled to exceptionally lenient treatment].) Pertinent here, an appellate brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) "It is axiomatic that an appellant must support all statements of fact in [their] briefs with citations to the record [citation] and must confine [their] statement 'to matters in the record on appeal.' " (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1239 [appeal reviews the correctness of the trial court's ruling as of the time of its rendition, upon a record of matters that were before the trial court for consideration]; *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 298 [documents identified at trial but not admitted in evidence could not be considered in evaluating support for liability verdict].) And if a party fails to support an argument with necessary citations to matters in the record, the argument will be deemed to have been waived. (*Conservatorship of Kevin. A.* (2015) 240 Cal.App.4th 1241, 1253.)

teach undergraduate-level courses such as chemistry, astrophysics and robotics to elementary and middle school students."

The Paper—through Johnson; Jocelyn Dong, its Editor-in-Chief; and Elena Kadvany, a reporter—conducted research and investigation, both for Boyd's endorsement interview on September 17, 2018, and to more generally cover the school-board election and candidates. After the interview, when Boyd did not produce what the Paper considered sufficient or satisfactory answers to factual discrepancies about Insted's claimed tax-exempt status and statements about it Boyd had made, the Paper withdrew its invitation for Boyd "to participate in the school board debate" held on September 20, 2018, of which the Paper was a sponsor.

On September 21, 2018, the Paper published a story about Boyd. It said, among other things, that Boyd had been "falsely claiming that his small after-school STEM program in Palo Alto"—Insted—"is a tax-exempt 501(c)3 nonprofit organization" but that the Paper's investigation had shown that it was not. The story explained that Insted was "not listed in the California Secretary of State's registered business database as a corporation or LLC" and that the "tax ID number Boyd provided to [the Paper]" was for a different and "wholly distinct" nonprofit entity with the same initials—"IEM"—but whose full name was the "Institute for Environmental Management" and whose mission was not education but "to 'develop and facilitate dissemination of technology for biofuels while minimizing greenhouse gas emission with special attention to solid waste.' " The story added that Boyd's resume listed him as the " 'chief educator' " of Insted, which was described on its "website as a nonprofit to which people can donate money for student scholarships."

The Paper also contacted the "co-director at the Institute for Environmental Management," who said that Boyd had " 'never worked for or

had authorization to represent himself as working for or involved in any way with the Institute for Environmental Management,' " which had " 'had essentially no activities for several years.' " The story added that "[w]hen asked to give evidence that Insted [was] affiliated with the Institute for Environmental Management, Boyd provided [to the Paper] a 2015 email" from one of its founders showing the founder had "set up a PayPal account to receive funds for Insted" and that the Institute for Environmental Management "was 'doing business as' the Institute for Education Management," but, the story added, "no fictitious business name statement indicating this change was on file" with the county clerk's office, "as required by law."

A follow-up editorial concerning the school board candidates published by the Paper on October 5, 2018, summed up that "Boyd says he operates an after-school program called Insted, but in researching his background [the Paper] found that his organization ha[d] served only a handful of kids and [was] not registered to do business in California, and he ha[d] falsely claimed it is a 501(c)3 tax-exempt organization."

II. *The Amended Complaint*

Boyd filed an amended unverified complaint (the complaint) on November 18, 2019.[3] It factually alleged that the Paper's print and digital versions were "the major sources of election and other news and information in Palo Alto" and "considered the most trustworthy local news source by 90% of Palo Alto residents," operating "a comprehensive 24/7 news, blogging, discussion" platform and providing "information on the community through its websites." Boyd alleged that the Paper claimed "an average of 431,000 monthly

[3] The record does not include the initial complaint, but references in the record indicate that Boyd filed his original pleading on September 23, 2019.

online visits" and had "75,000 print readers" with the print publication "distributed to all households in Palo Alto and East Palo Alto."

The complaint alleged that Johnson, the founder of Embarcadero and a shareholder, was "the publisher of content that defamed and libeled [Boyd] during the [e]lection for [the] Palo Alto School Board" in September, October, and November of 2018. It further alleged that "Insted is an experimental[,] small after-school program formed in 2014 by a group of Palo Alto district parents who wanted more progressive, innovative education for their children" and that "Insted wanted to develop new ways to teach science." Boyd was alleged to be "the 'Chief Educator' at Insted," which "has a legal non[-]profit status because it was established as a project or under fiscal sponsorship of an established non[-]profit called Institute for Environmental Management, [I]nc. (IEM)" that had been "in continuous operation" for 30 years.

The complaint went on to allege that the "Director of IEM," Don Augenstein, "participated in the establishment and management of Institute for Education Management/Insted in 2014; he approved the website, [and] set up a PayPal account for Insted affiliated with the nonprofit IEM. As fiscal sponsor[,] Mr. Augenstein handled financial and operational issues of Insted (The STEM program). He donated $12,000, created bank accounts and credit card accounts. Insted was short for Institute for Educational Management."

As further alleged, Boyd ran for a seat on the local "Board of Education" and "on approximately September 21 to 24, 2018," "Johnson suddenly published headlines in the Palo Alto Online" falsely claiming that Boyd had " '[m]isrepresented his STEM program' and that [the] '[f]our[-]year[-]old program is not a legal nonprofit.' " As further detail about the pieces published by the Paper in September 2018, the complaint alleged that "the [a]rticle headline falsely assert[ed] that a '[s]chool board candidate misrepresent[ed] his

STEM program,' [and] the subheading stat[ed] that the '[f]our-year-old after-school program is not a legal nonprofit, as Christopher Boyd alleges.' " The complaint further quotes the article as having said that " 'Christopher Boyd, who is running for a seat on the Palo Alto Unified School District Board of Education in November's election, has been falsely claiming that his small after-school STEM program in Palo Alto is a tax-exempt 501(c)3 nonprofit organization, an investigation by the Weekly found.' " The article is further quoted as having said that "IEM" did not file tax returns or forms since 2011 and had "essentially no activities for several years."

The complaint goes on to allege why the statements made by the Paper in September 2018, were "unequivocally false" and that "IEM" did file the "appropriate version of Form 990 in 2013, 2014, and 2016" and as a charitable organization, it was not required by law to make a fictitious"[-]business[-]name filing." Further, as alleged, the Internal Revenue Service has "approved fiscal sponsorship" arrangements "to satisfy the requirements of [s]ection 501(c)3" and that "sponsored projects," presumably like Insted, "often conduct their activities under the brand of the project, rather than in the name of the fiscal sponsor. Accordingly, it is neither improper nor unusual for personnel conducting activities associated with a fiscal sponsorship project to refer to those activities using the project's brand, and to describe them, accurately, as charitable activities." Johnson is alleged to have published the September 2018 statements about Boyd in the Paper to "attack" him, "branding [him] as a liar, criminal, embezzler and fraudster."

The complaint went on to allege that Boyd had provided the Paper with information from which it could have discerned the falsity of its statements about him, namely "bank account formation documents proving the non[-]profit status for Insted" and "legal opinions" from specialists in "non[-]profit law,"

which allegedly supported the truth of Boyd's statements that were claimed by the Paper to have been false or questionable.

The complaint then referred to the Paper's October 5, 2018 editorial, quoting its summed-up discussion of Boyd and his after-school program, Insted. And it alleged that "as an act of pure malice, libel, slander and defamation," the Paper, as a sponsor of the traditional "community open public debate between all the candidates," "publicly barred [Boyd from] attending."

The first cause of action of the complaint was for "defamation (libel)," and targeted the Paper's September 2018 article. The second was for intentional infliction of emotional distress; it focused on the Paper's "publication" of "false and defamatory material" without further date specificity. The third cause of action was labeled "intentional infliction of mental and personal injury" to Boyd by Johnson having "engage[d] in a malicious pattern of humiliating and defaming certain candidates based on unlawful profiling" by the Paper's reporting and coverage.

The complaint attached as unauthenticated exhibits the Paper's September 21, 2018 article on Boyd; the Paper's October 5, 2018 editorial; a post-publication letter from a lawyer to the Paper demanding retraction of its statements about Boyd; a post-publication legal opinion directed to Boyd on non-profit and "fiscal sponsorship" issues as concerns "IEM" and "Insted"; and copies of a few of Don Augenstein's 2015 e-mails to Boyd about Boyd's "STEM program" needing financial support and its financial affiliation with the Institute for Environmental Management, along with the draft communication to PayPal about setting up an account for the "STEM program" previously provided to Johnson.

III. *The Anti-SLAPP Motion and the Trial Court's Order*

On January 21, 2020, Embarcadero and Johnson filed their anti-SLAPP motion directed to the entire complaint and each of its three causes of action. The motion first argued that the Paper's reporting on Boyd as a candidate for office and respondents' conduct associated with the candidate-debate forum—all the conduct challenged by the complaint—were "in connection with a public issue or an issue of public interest within the ambit of the anti-SLAPP statute," specifically under section 425.16, subdivisions (e)(3) and (e)(4). This showing was argued to have shifted the burden to Boyd "to establish, with admissible evidence, a probability that he will prevail on his claims."

The motion offered several arguments as to why Boyd could not meet this evidentiary burden. These included that: 1) the allegedly defamatory statements were substantially true; 2) Boyd, as a public figure, could not show by clear and convincing evidence that the allegedly defamatory statements were made with actual malice; 3) Boyd's exclusion from the debate was also constitutionally protected as free speech; and 4) the two non-defamation causes of action were based on the same factual allegations and were therefore superfluous and likewise subject to dismissal.

Three declarations outlining the pre-publication investigatory steps taken by the Paper supported the anti-SLAPP motion: Johnson's, Jocelyn Dong's as Editor-in-Chief for the Palo Alto Weekly, and Elena Kadvany's as the education and youth reporter for the Palo Alto Weekly.

Johnson's declaration explained that in preparation for the Paper's endorsement interview of Boyd, he searched for online information about "Insted" or the "Institute of Education Management," beginning with its "claimed non-profit, tax-exempt status." In doing so, Johnson and his staff "worked from the understanding that non-profit organizations in California

must file Articles of Incorporation with the Secretary of State, appoint directors, submit bylaws, and take various documented steps" and must also "file papers with the state Attorney General's Registry of Charitable Trusts and the Secretary of State, and then apply to the Internal Revenue Service for tax-exempt status." Johnson checked the available databases for the California Secretary of State and Attorney General for any filings of Boyd's claimed non-profit entity, whether known as "Insted" or the "Institute of Education Management," and found nothing to suggest that such an entity had section "501(c)3 tax-exempt status." He also "checked with Guidestar, a publicly available source for records of non-profit organizations, for IRS filings," and likewise found nothing.

Johnson's declaration further explained that he conducted the Paper's endorsement interview of Boyd on September 17, 2018, which was later posted on YouTube.[4] In the interview, Johnson asked Boyd "whether Insted and the Institute of Education Management were the same organization." In response, Boyd explained that the "Institute for Education Management 'is a non-profit organization [that] has existed for decades. It basically is fostered to further education, primarily . . . working on solving brilliant educational problems, and they sponsored Insted.' " Boyd further said that the Institute of Education Management was based in Palo Alto, that he did not run it, and that he did not know who was running it or who was on its board. He confirmed "that charitable contributions can be made to Insted through the Institute of

[4] A compact disc of the recorded interview was apparently submitted to the trial court with the anti-SLAPP motion as an exhibit to Johnson's declaration. The disc is not part of the record on appeal. Boyd's brief on appeal also refers to other exhibits as missing from the record, as to which he indicated an intent to remedy by motion filed in this court. We are not aware of any such motion having been filed.

Education Management," as stated on Insted's website. Boyd then referred to the Institute of Education Management "as 'IEM,' saying that IEM provide[d] initial funding to Insted to get it off the ground," and then confirming that by " 'IEM,' he meant the Institute for Education Management."

Per Johnson's declaration, he informed Boyd in the interview that the Paper was not able to find any public record of the entity called Insted or the Institute for Education Management, including for its claimed tax-exempt status. Boyd then provided "a [tax identification] number for an organization he referred to as 'IEM, Inc.' " After the interview, the Paper determined that the tax identification number Boyd had provided was for an entity Boyd had not referenced "during the interview or on Insted's website—the Institute for *Environmental* Management." The Paper was then able to locate a 2011 tax filing for that entity, which stated that its "mission is to 'develop and facilitate dissemination of technology for biofuels while minimizing greenhouse gas emissions with special attention to municipal solid waste.' " Johnson also found contact information for a person identified as "CEO of the Institute for Environmental Management," which he provided to reporter Kadvany to "find out more about Insted's relationship to the Institute of Environmental Management, if any." Kadvany contacted the listed CEO, who, as she later informed Johnson, "disclaimed any association" with Boyd and said that Boyd "was never authorized to represent himself as having worked for or [having been] affiliated or involved with the Institute for Environmental Management."

Johnson also "reviewed several reputable sources for information on best practices relating to fiscal sponsorships, including the National Network of Fiscal Sponsors" and "the NNFS Guidelines for Fiscal Sponsorships," from which he learned that "best practices for fiscal sponsorships require

complementary missions" and he concluded that the "missions of Insted and the Institute of Environmental Management were not compl[e]mentary."

Because of the "discrepancies and lack of information supporting" Boyd's statements about "Insted's non-profit and tax-exempt status" published on Insted's website and repeated by Boyd in his interview with Johnson, Johnson sent Boyd a "follow-up email seeking further clarification about Insted." Boyd replied by forwarding a 2015 "email from Don Augenstein containing a draft email to PayPal for Mr. Boyd's review with directions as to how a PayPal account was to be set up under an email address for Insted but under the organization [called the] Institute for Environmental Management 'doing business as' the Institute for Educational Management." Johnson responded that the e-mail did not "provide any useful information, 'other than indicating that [Augenstein] and [Boyd had] made arrangements to accept money from people through this PayPal account and that [Augenstein] is apparently using his non-profit status for one organization to assist an entity that is not a non-profit nor registered with the State of California.' " Johnson further informed Boyd that "there was no indication on the Institute for Environmental Management's 990 forms, which tax-exempt organizations are required to file with the Internal Revenue Service, that it ever made any disbursements" to Boyd or Insted.[5] Boyd responded, questioning the relevance of this issue to his candidacy.

Johnson answered, "explaining that the paper's questions were 'highly relevant to [Boyd's] qualifications to serve as a school board member' " and pointing out that Boyd was "presenting [him]self as the leader of an organization (Insted) that is unknown to the State of California and that has

[5] The e-mails between Johnson and Boyd referenced in Johnson's declaration were attached to it as an exhibit.

been misrepresented on [Insted's] website as Institute for Education Management . . . .' " Johnson also told Boyd that "unless he were able to answer the questions posed [by the Paper] about Insted and its relationship to the Institute for Environmental Management, the paper would be withdrawing his invitation to participate in the school board debate to be held on September 20, 2018." Boyd did not respond.

Johnson further explained in his declaration that in addition to the issues about Insted and its non-profit status, the Paper had also found some discrepancies as to Boyd's residency in Palo Alto, which would have affected his eligibility to run for the school board. But because the information was "inconclusive," the Paper decided not to reference it in its publications about Boyd.

Johnson finally explained in his declaration that after its investigation, the Paper published its article on Boyd on September 21, 2018, titled " 'School board candidate misrepresents his STEM program," and then repeated its findings on Boyd in truncated form in its October 5, 2018 editorial. Johnson expressed that at the time of publishing both pieces, he "had no reason to doubt the accuracy of our reporting in any respect" and had "no reason to doubt the veracity of our investigation or sources consulted." He "believed [the Paper's] reporting was true and accurate at the time it was published" and "still believe[d] the statements [were] true and accurate."

The declaration of Palo Alto Weekly's Editor-in-Chief, Jocelyn Dong, explained that she first learned of Boyd's candidacy for the Palo Alto School District Board of Education in August 2018, when he filed papers to run for office. As part of the Paper's reporting on candidates, she reviewed Insted's website and "found that it referred to Insted as a non-profit organization with a 501(c)3 tax[-]exempt status" in "at least four places." Dong also obtained a copy

of a school newsletter circulated to local elementary school parents, which contained similar statements about Insted that were attributed to Boyd. After Boyd's recorded interview with Johnson on September 17, 2018, Dong "searched for information relating to the tax ID number Mr. Boyd [had] provided during his interview and found that it was not linked to Insted or the Institute for Education Management, but instead belonged to an organization never referenced by Mr. Boyd during his interview or on Insted's website—the Institute for Environmental Management." Dong then located the "bylaws and 990 filings for that organization, which show[ed] all of its expenditures and grants relate[d] to energy and the environment—a mission noticeably distinct from that of Insted."[6]

After Boyd provided to Johnson the 2015 e-mail he had received from Don Augenstein about setting up a PayPal account "using Insted's email address but as a dba for the Institute of *Environmental* Management, [Dong] searched the Santa Clara County and Contra Costa County Clerk Recorder's Office databases for any DBA filed by the Institute for Environmental Management or IEM, Inc." but she was "unable to locate any" such filing.

Dong's declaration likewise stated that when the Paper published its pieces on Boyd in September and October 2018, after its investigation, she "had no reason to doubt that our reporting was accurate in any respect" or any "reason to doubt the veracity of our investigation or sources consulted." She "believed [the Paper's] reporting was true and accurate" when it was published and still believed the statements to be "true and accurate."

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[6] Dong's declaration attached the Insted website screenshots, the newsletter, and the articles of incorporation and bylaws for the Institute for Environmental Management.

The declaration of the Paper's "education and youth reporter," Elena Kadvany, explained that she covered education issues in Palo Alto, including past school-board elections. Kadvany, too, learned of Boyd's candidacy for the school board in August 2018, and she began investigating to report on his candidacy. Kadvany first contacted Boyd on August 17, 2018, to request an interview. He did not commit to one and the Paper ran an initial, brief story on Boyd's candidacy on August 20, 2018, using information available from his LinkedIn page and Insted's website. Both sources referred to Boyd as Insted's "director" and described Insted as "a non-profit, tax-exempt 501(c)3 organization."

Kadvany then provided Boyd a link to the initial story and on August 23, 2018, she again asked him for an interview about his candidacy—a separate interview to occur before the one requested by Johnson as part of the Paper's endorsement process. Boyd responded to Kadvany that he "would provide information about his vision and campaign but asked that those details not be published." On August 27, 2018, Kadvany asked Boyd for a "copy of his ballot statement, election survey responses, and responses to the teacher's union candidate-forum questions. In response, [Boyd] said he had not filed a ballot statement, had not participated in the teacher's union forum and would provide survey responses 'as they come up.' " On September 14, 2018, Kadvany again asked Boyd for an interview "for the cover story [she] was working on about the candidates. He responded on September 17, 2018, the day of his endorsement interview with Johnson, with a copy of his resume."

As noted, after Boyd's endorsement interview with Johnson, the Paper connected the tax identification number Boyd had provided to the Institute for Environmental Management. Kadvany contacted that organization's listed CEO to inquire about the group's "association with Insted, if any. In response, [the

CEO] sent [her] an email stating, 'I do not know anything about Insted[]' and 'Mr. Boyd never worked for or had any authorization to represent himself as working for or involved in any way with the Institute for Environmental Management (IEM).' "[7]

As with Johnson and Dong, Kadvany declared that when the Paper published its article on Boyd on September 21, 2018, and its endorsement piece on October 5, 2018, after its investigation, she "had no reason to doubt the accuracy of [the Paper's] reporting in any respect" and "had no reason to doubt the veracity of [their] investigation or sources consulted. [She] believed [their] reporting was true and accurate" when it was published and when she signed her declaration.

Boyd opposed the anti-SLAPP motion, but his papers consisted of only a memorandum of points and authorities. Although his papers referenced a request to permit "limited discovery," he made no formal or noticed motion for that relief in the trial court under section 425.16, subdivision (g). His papers did not dispute that the anti-SLAPP statute applied to his claims. Moving on to whether he could show a likelihood of prevailing, he attached to his brief a separate statement of material facts, similar in tabular form to that required on a motion for summary judgment (see § 437c, subd. (b)(1); Cal. Rules of Court, rule 3.1350).[8] But he offered no evidence—by way of declarations, affidavits, or

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[7] Attached to Kadvany's declaration were hard copies of Boyd's LinkedIn page from September 2018 and December 2019, and a copy of Kadvany's e-mail exchange with the CEO of the Institute of Environmental Management.

[8] The print on this attachment in the record is so reduced in size as to be illegible. As noted, Boyd's brief in opposition also discussed and referenced certain "exhibits," but no such exhibits appear in the appellate record, and respondents in reply indicated to the trial court that they had never received them from Boyd. Respondents objected to the exhibits as hearsay to the extent

requests for judicial notice—in opposition to the motion, including to authenticate or provide an evidentiary foundation for any of the exhibits or documents he referenced or discussed in his brief or in his separate statement.[9]

In his legal argument, Boyd characterized the three declarations filed in support of the motion as "astonishingly and overwhelmingly false," but he left them uncontradicted by any actual evidence. Boyd also said the Paper's pieces on him contained false and defamatory matter about Insted's non-profit status. He referenced the contents of the post-publication retraction-demand letter sent to the Paper by his lawyer and the separate legal opinion he had obtained from other lawyers about the propriety of a non-profit organization's "sponsorship" of another entity or "project," both of which he had attached to his complaint but which lacked any evidentiary foundation or authentication.

Respondents filed a reply, which argued, among other things, that Boyd's opposition had conceded the substantial truth of the Paper's alleged defamatory statements because, as it had reported, he had represented that Insted was a non-profit, tax-exempt section 501(c)3 organization but his opposition admitted that it was not, instead only a "project" with some form of fiscal sponsorship by a different entity with a different mission. The reply also urged that Boyd had offered no evidence of actual malice to show that when the Paper's pieces on

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they were offered for the truth of the matter asserted and they objected to the "separate statement" attached to Boyd's opposition as legal argument, not evidence.

[9] Boyd asserted at oral argument that he had had difficulty e-filing in the trial court evidence he had intended to proffer in opposition to the anti-SLAPP motion, which he now wishes to be considered on remand. But, from the record, it does not appear that Boyd ever raised this point in the trial court or brought the issue to the court's attention or requested but was denied an opportunity to present opposition evidence that he had been unable to file. The issue is thus not preserved for appeal.

him were published, anyone from the Paper knew the alleged defamatory statements were or might be false or that anyone associated with the Paper had acted with reckless disregard for the truth, such that Boyd had not shown any likelihood of prevailing on his claims.

The trial court granted respondents' anti-SLAPP motion, concluding that the challenged activities of the Paper—news reporting on an election candidate—were protected "free speech activity" within the meaning of the anti-SLAPP statute, which shifted the burden on the motion to Boyd to show the probability of his prevailing on the merits. As to this, the court emphasized that Boyd had not submitted "*any* evidence, much less admissible evidence, in support of his claims." But on the defamation claim, even "assuming arguendo that [the] statements in [the Paper] were false," Boyd had not met his burden to show that "there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment as to actual malice," which must be proved, the court noted, by clear and convincing evidence. The court specifically found that Boyd's "supposition" that the Paper did no fact-checking before publishing information about him was unsupported by any evidence and that there was likewise "no evidence that [respondents] entertained serious doubts about the truth of the statements in their articles." The court further determined that Boyd could not prevail on his remaining emotional distress claims because they were likewise without any evidentiary support, but also because they were "[predicated] on the same factual allegations as those of a simultaneous libel claim" and were thus "superfluous and must be dismissed" as being without merit, citing *Couch v. San Juan Unified School District* (1995) 33 Cal.App.4th 1491, 1504 (*Couch*).)

Boyd timely appealed from the order, which is appealable under section 425.16, subdivision (i) and section 904.1, subdivision (a)(13).[10]

DISCUSSION

I. *The Anti-SLAPP Statute*

The Legislature enacted the anti-SLAPP statute to address "what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of free speech rights." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) The statute provides that a cause of action arising from an act in furtherance of a defendant's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike unless the plaintiff demonstrates a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); see *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009 (*Bonni*); *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788 (*Monster Energy*).) The statute is " 'intended to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest.' " (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619.) As subdivision (a) of section 425.16 expressly mandates, the statute must be "construed broadly."

"Litigation of an anti-SLAPP motion involves a two-step process. First, 'the moving defendant bears the burden of establishing that the challenged allegations or claims "aris[e] from" protected activity in which the defendant has engaged.' [Citation.] Second, for each claim that does arise from protected

[10] Boyd references in his opening brief a later order or judgment of the trial court awarding attorney fees to respondents under the anti-SLAPP statute. If that is the case, such a fee order or judgment is separately appealable and is beyond the scope of our review in this appeal.

activity, the plaintiff must show the claim has 'at least "minimal merit" ' [Citation.] If the plaintiff cannot make this showing, the court will strike the claim." (*Bonni, supra*, 11 Cal.5th at p. 1009; accord, *Monster Energy, supra*, 7 Cal.5th at p. 788.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

As part of the second step, we apply a " ' "summary judgment-like procedure." [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] "Claims with the requisite minimal merit may proceed." ' " (*Sweetwater Union High School District v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940 (*Sweetwater*); accord, *Taus v. Loftus* (2007) 40 Cal.4th 683, 713–714 (*Taus*).)

Further at the second step, "the court may consider affidavits, declarations, and their equivalents if it is reasonably possible the proffered evidence set out in those statements will be admissible at trial. Conversely, if the evidence relied on *cannot* be admitted at trial, because it is categorially barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection. If an evidentiary objection is made, the plaintiff may attempt to cure the asserted defect or demonstrate the defect is curable." (*Sweetwater, supra*, 6 Cal.5th at p. 949.)

"We review de novo the grant or denial of an anti-SLAPP motion," applying the same two-step analysis as the trial court. (*Park v. Board of*

Trustees of California State University (2017) 2 Cal.5th 1057, 1067; accord, *Baral, supra,* 1 Cal.5th at p. 384.) " ' "Thus, we apply our independent judgment, both to the issue of whether the cause of action arises from protected activity and whether the plaintiff has shown a probability of prevailing on the claim." ' [Citation.] An appellant still bears the ' "burden of affirmatively demonstrating error." ' [Citation.]" (*Balla v. Hall* (2021) 59 Cal.App.5th 652, 671 (*Balla*).)

II. *Boyd's Claims Arise from Protected Activity*

Under section 425.16, an act " 'in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " includes, in relevant part, "any written or oral statement or writing made in . . . a public forum in connection with an issue of public interest, or . . . any other conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subds. (e)(3) & (e)(4).)

As in the trial court, Boyd does not contest on appeal that the anti-SLAPP statute applies to his claims against respondents in that their alleged offending conduct—news reporting and editorial content about the local school board election and Boyd's exclusion from a candidate-debate forum sponsored by the Paper—is protected activity under the statute, satisfying step one of the analysis. These activities fit within either section 425.16, subdivision (e)(3)—a written or oral statement or writing made in a public place or forum in connection with an issue of public interest—or (e)(4)—any conduct in furtherance of the constitutional right of free speech in connection with an issue of public interest. A defendant moving under the anti-SLAPP statute need only show that its conduct fits one of the four categories set out in section 425.16, subdivision (e). (*Navellier, supra*, 29 Cal.4th at p. 88.)

But to confirm, for purposes of applying section 425.16, subdivision (e)(3), courts have held that news reporting in the media is a " 'public forum' " under the anti-SLAPP statute "if it is a vehicle for discussion of public issues and it is distributed to a large and interested community." (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1161.) *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476–477, held that a newsletter published to members of a homeowners' association was a " 'public forum' " even if access to the newsletter was selective and limited. The court in *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1086, likewise concluded that a local newspaper that is a vehicle for public discussion constitutes a "public forum." *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039, similarly held that an interview published in a magazine qualified as a "public forum," as "public *access*, not the right to public *comment* is the hallmark of a public forum." And the court in *Sonoma Media Investments, LLC v. Superior Court (Flater)* (2019) 34 Cal.App.5th 24, 33–34 (*Sonoma*), held that a newspaper and website are public forums because the public can access them; it is irrelevant that the public cannot also actively participate or interact in such forums. (But see *Weinberg v. Feisal* (2003) 110 Cal.App.4th 1122, 1130–1131 [most newspapers, newsletters, and other media outlets not public forums because access is selective and limited].) And we have little doubt that media reporting and editorializing on a local school board election is "an issue of public interest" as used in section 425.16, subdivision (e)(3). (*See Sonoma, supra*, 34 Cal.App.5th at p. 35 [it is "beyond dispute that elections in general, . . . affect large numbers of people and are topics of widespread interest"].)

For purposes of applying section 425.16, subdivision (e)(4), arguably broader than subdivision (e)(3), no public forum is required and even private

conduct is protected if it is in furtherance of the constitutional rights of petition or free speech in connection with a public issue. (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736.) In any event, "[i]t is beyond dispute that reporting the news is an exercise of free speech. (See, e.g., *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775–776 [newspaper articles equated with free speech]; *Joseph Burstyn v. Wilson* (1952) 343 U.S. 495, 501 [newspapers characterized as form of 'expression']; *Lieberman* [*v. KCOP Television, Inc.* (2003)] 110 Cal.App.4th [156, 164–166] [reporting the news qualifies as free speech].)" (*Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, 1044.)

Further, to the extent Boyd's claims are rooted in his exclusion from the candidate-debate forum, "[m]aintaining a forum for discussion of issues of public interest is a quintessential way to facilitate rights." (*Hupp v. Freedom Communications, Inc.* (2013) 221 Cal.App.4th 398, 405 [newspaper publisher's maintenance of a website with articles and commentary available to public].) And a newspaper has First Amendment rights to exercise viewpoint exclusion and editorial judgment. (*Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 247–258.)

We thus easily conclude at step one of the anti-SLAPP analysis that Boyd's claims arise from protected activity, which shifted the burden to him at the second step of the analysis to show a probability of prevailing in that his claims are "legally sufficient and factually substantiated." (*Baral, supra*, 1 Cal.5th at p. 396.)

III. *Boyd Failed to Show a Probability of Prevailing on the Merits*

We have described above the required showing by a plaintiff at step two of the anti-SLAPP analysis—to demonstrate with admissible evidence a probability of prevailing on pleaded causes of action. But we elaborate here a bit

before proceeding as Boyd, without having offered admissible evidence below and having relied in part on his complaint and its attachments, appears to contend on appeal that no admissible evidence is required by a plaintiff at this juncture, so long as such evidence will be offered at trial. In this, Boyd relies on but misreads *Sweetwater*.

A plaintiff can meet the burden at step two by stating "legally sufficient" claims and making a "prima facie factual showing" with competent, admissible evidence sufficient to sustain a favorable judgment on each cause of action. (*Baral, supra*, 1 Cal.5th at pp. 384–386.) Stated another way, a plaintiff must show that there is admissible evidence that, if credited, would meet this bar. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108 (*McGarry*).) And the court must accept as true the evidence in favor of the plaintiff. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) The showing may be satisfied "if it is reasonably possible the evidence set out in supporting affidavits, declarations or their equivalent will be admissible at trial." (*Sweetwater, supra*, 6 Cal.5th at p. 947.) In ruling on the motion, the court does not weigh the proffered evidence for credibility or persuasiveness, instead only to determine if the moving party's evidence defeats the plaintiff's claim as a matter of law. (*Baral, supra*, 1 Cal.5th at pp. 384–385.)

While the pleadings are properly considered in determining the nature of a plaintiff's claim—meaning, at step one, whether the anti-SLAPP statute applies—they fall short of demonstrating evidentiary facts at step two. (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 207 Cal.App.4th 97, 109 [pleadings may be considered in determining the claims, but declarations stating evidentiary facts are required to oppose the motion]; *Thayer v. Kabateck Brown Kellner LLP* (2012) 212 Cal.App.4th 141, 155 [same]; *Barker v. Fox & Assocs.* (2015) 240 Cal.App.4th 333, 350–351, fn. 7 [same].) Thus, a plaintiff may not at

step two rely solely on pleadings, instead needing proof based on " 'competent, admissible evidence.' " (*Belen v. Ryan Seacrest Productions, LLC* (2021) 65 Cal.App.5th 1145, 1159 (*Belen*); *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 590 [plaintiff opposing anti-SLAPP motion cannot rely even on verified pleadings to demonstrate a probability of success on the merits].)

We now apply this evidentiary standard to the showing Boyd made in support of his claims. But we start with the legal elements of a claim for defamation, which can involve either libel or slander. (Civ. Code, § 44, subds. (a) & (b).) Boyd cast his claim as "libel" and "libel per se."

"Defamation ' "is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." ' [Citation.] [Civ. Code, § 44.] Libel is a type of defamation based on written or depicted communication. (Civ. Code, § 45; *Jackson* [*v. Mayweather* (2017) 10 Cal.App.5th 1240,] 1259–1260.)" (*Balla, supra*, 59 Cal.App.5th at p. 675; see also *Taus, supra*, 40 Cal.4th at p. 720.) It is a "false and unprivileged publication by writing . . . , which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) "Libel per se is when the communication is defamatory without the need for explanatory matter. (Civ. Code, § 45a.)" (*Edward v. Ellis* (2021) 72 Cal.App.5th 780, 790 (*Edward*); see also *McGarry, supra,* 154 Cal.App.4th at p. 112.)

"In determining whether a statement is libelous[,] we look to what is exactly stated as well as what insinuation and implication can be reasonably drawn from the communication." (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803 (*Forsher*); accord *Issa v. Applegate* (2019) 31 Cal.App.5th 689, 703.) "[T]he expression used as well as the 'whole scope and apparent object of the writer' must be considered." (*Forsher*, at p. 803; accord *Wong v. Jing* (2010) 189

Cal.App.4th 1354, 1373.) "We focus not on the literal truth or falsity of each word in a statement but rather on ' " 'whether the "gist or sting" of the statement is true or false, benign or defamatory, in substance.' " ' [Citations.] We also consider 'whether the reasonable or "average" reader would so interpret the material. [Citations.] The "average reader" is a reasonable member of the audience to which the material was originally addressed.' (*Couch*[, *supra*,] 33 Cal.App.4th [at p.] 1500.)" (*Edward, supra,* 72 Cal.App.5th at p. 790.) "Whether published material is reasonably susceptible of an interpretation which implies a provably false assertion of fact—the dispositive question in a defamation action—is a question of law for the court." (*Couch, supra*, 33 Cal.App.4th at p. 1500.)

"Public figures have the 'burden of proving both that the challenged statement is false, and that [defendant] acted with " 'actual malice.' " ' [Citations.]"[11] (*Balla, supra*, 59 Cal.App.5th at p. 675.) This means "a libel plaintiff who is a public figure must prove, by clear and convincing evidence, that the defendant made the libelous statement . . . with knowledge that it was false or with reckless disregard of whether it was false or not." (*Edward, supra*,

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[11] "An 'all-purpose' public figure has ' "achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." ' [Citation.] A ' "limited purpose" ' public figure is one who ' "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." ' [Citations.]" (*Balla, supra*, 59 Cal.App.5th at p. 676.) Respondents posit that Boyd as a candidate for office is a public figure for purposes of this analysis, and he does not dispute this. (*Harte Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 686–687 [public discussion of candidate's qualifications for elective office presents strong case for application of rule requiring proof of actual malice]; accord, *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 36–37; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1010–1012, 1018–1021.) We conclude that Boyd is indeed a public figure for this purpose, or at least a limited-purpose public figure.

72 Cal.App.5th at p. 793.) " ' "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth," ' and the evidence must be clear and convincing. [Citation.]" (*Balla, supra*, 59 Cal.App.5th at p. 683.) " '[A]ctual malice can be proved by circumstantial evidence. [Citation.] Considerations such as 'anger and hostility toward the plaintiff,' 'reliance upon sources known to be unreliable [citations] or known to be biased against the plaintiff,' and 'failure to investigate' may, 'in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [Citation.] Such evidence is relevant 'to the extent that it reflects on the subjective attitude of the publisher,' and the failure to investigate, without more, generally is insufficient.' [Citation.]" (*Id.* at p. 683.) "And 'we will not infer actual malice solely from evidence of ill will, personal spite or bad motive.' [Citation.]" (*Edward, supra*, 72 Cal.App.5th at p. 793.) Finally, malice "focuses solely on the defendant's subjective state of mind at the time of publication." (*Sutter Health v. UNITE HERE* (2010) 186 Cal.App.4th 1193, 1210 (*Sutter*).)

On the record before us, we conclude that Boyd did not show a prima facie case of defamation (whether as libel or libel per se), on the elements of either falsity or actual malice.

First, there is no evidence in the record either that respondents' written statements that Boyd had misrepresented Insted as a non-profit, tax-exempt section 501(c)3 entity were false or not substantially true, or that the statements were made with actual malice, meaning with knowledge of their falsity or reckless disregard of their truth. Boyd argues that his complaint and its attachments and the "separate statement" attached to his opposition brief constituted proof on these elements to meet the required evidentiary showing under *Sweetwater*. They do not.

Sweetwater reiterated that a plaintiff opposing an anti-SLAPP motion and seeking to establish a prima facie factual showing at step two of the analysis may not rely solely on even a verified pleading and must offer proof upon " 'competent, admissible evidence.' " (*Sweetwater, supra*, 6 Cal.5th at p. 940.) At issue in the case was whether guilty or no-contest plea forms that had incorporated written factual narratives given under penalty of perjury and transcript excerpts of grand-jury testimony offered by the plaintiff in opposition to an anti-SLAPP motion were properly considered over a hearsay objection. The high court held that the plea forms executed under penalty of perjury constituted declarations under section 2015.5, and they were thus properly considered in the context of an anti-SLAPP motion. (*Id.* at p. 942.) As to the transcript excerpts of grand-jury testimony, these did not satisfy section 2003 as a " 'written declaration under oath' " as they were instead a "written memorialization of an oral examination under oath." (*Ibid.*) The transcript excerpts also did not meet the requirements of section 2015.5 because transcripts of testimony are not declarations " 'subscribed by' " the testifying witness. But the court determined that the transcripts of grand-jury testimony could still be considered as part of the plaintiff's prima facie factual showing of merit because they are " 'of the same nature as a declaration in that the testimony is given under penalty of perjury' " and section 425.16 already "permits consideration of affidavit equivalents" that are made "under penalty of California's perjury laws." (*Id.* at pp. 942–943.)

Further, according to *Sweetwater*, "[i]t would not serve the purposes of the SLAPP Act to preclude consideration of testimony made under oath. This sworn testimony is at least as reliable as an affidavit or declaration." (*Sweetwater, supra*, 6 Cal.5th at p. 943.) And, given that an affidavit or declaration in opposition to an anti-SLAPP motion is "to demonstrate that admissible evidence

exists to prove plaintiff's claims" and they must be made "by competent witnesses with personal knowledge of the facts they swear to be true," statements such as those made in the plea forms and grand-jury transcripts at issue "would serve to establish personal knowledge and competence" in the same manner as an affidavit or declaration. (*Id.* at p. 945.) Thus, "in determining a plaintiff's probability of success, the court may consider statements that are the equivalent of affidavits and declarations because they were made under penalty of perjury in California," but that does not end the inquiry. (*Ibid.*)

Such material "may be considered at the anti-SLAPP motion stage if it is reasonably possible the evidence *set out in supporting affidavits, declarations or equivalent* will be admissible at trial." (*Sweetwater, supra,* 6 Cal.5th at p. 947; see p. 949, italics added.) In other words, to be considered, materials that are affidavit equivalents offered in opposition to an anti-SLAPP motion must be shown to be likely admissible at trial, because, for example, authentication problems that exist early in litigation when anti-SLAPP motions are being litigated are likely to be overcome or cured, and the materials are not categorically barred by a substantive rule of evidence such that they will *never* be admissible. (*Id.* at pp. 947–949; see also *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1146–1148 [edited videotape not properly authenticated still within consideration on anti-SLAPP motion because high probability existed that plaintiff could show precondition to admissibility—authentication—at trial].) Further, if "an evidentiary objection is made, the plaintiff may attempt to cure the asserted

defect or demonstrate the defect is curable."[12] (*Sweetwater, supra*, 6 Cal.5th at p. 949.)

In sum, Boyd attempts to stretch *Sweetwater* to authorize at step two of the anti-SLAPP analysis a court's evidentiary consideration of matter, such as factual allegations in his complaint or its unauthenticated attachments, or factual statements made in arguments in his legal brief. But such matters are not affidavits or their equivalents as they are not in any sense made under penalty of perjury. (*In re Zeth S.* (2003) 31 Cal.4th 396, 413, fn. 11 [on appeal, as in superior court, unsworn statements or argument are not evidence].) The materials at issue in *Sweetwater*—plea forms attested to under penalty of perjury and transcripts of grand-jury testimony elicited under penalty of perjury—are readily distinguished from the documents or matters of which Boyd seeks evidentiary consideration here. Although he made allegations in his complaint and buttressed them in his legal argument opposing the anti-SLAPP motion, these factual assertions are not evidence and they cannot be considered in ascertaining whether Boyd showed that his claims have the minimal merit sufficient to meet his burden, under *Sweetwater* or otherwise. Even if Boyd could at trial make these same factual assertions in admissible form, or at least some of them, nothing in the record here amounts to "proffered evidence set out in" "affidavits, declarations, and their equivalents" showing that any statements made in the complaint, Boyd's anti-SLAPP opposition, or any attachments will be admissible at trial. (*Sweetwater*, *supra*, 6 Cal.5th at p. 949.)

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[12] As noted, in their reply papers below, respondents said they had not received Boyd's referenced exhibits. They also lodged hearsay objections to the exhibits referenced in (but not attached to) Boyd's opposition to the extent any of them had been referenced by Boyd for the truth of the matter asserted.

Boyd also latches onto *Sweetwater*'s statement that if an evidentiary objection is made, "the plaintiff may attempt to cure the asserted defect or demonstrate the defect is curable" (*Sweetwater, supra*, 6 Cal.5th at p. 949), contending that he was deprived of the opportunity to cure and implying that such an attempt may be made on appeal from the grant of an anti-SLAPP motion, or later on remand. We read this sentence in *Sweetwater* to refer to the anti-SLAPP proceedings already held in the trial court, where facing respondents' evidentiary objections, Boyd made no attempt to cure the evidentiary void or defects in his opposition or to demonstrate that the void or defects were curable. Not having made that effort in the trial court, it is too late to now claim for the first time that he could somehow later meet his evidentiary burden. (*Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 379 [appellant forfeits a claim of error by failure to take proper steps in the trial court by motion or objection to avoid or cure it]; *Doers v. Golden Gate Bridge, Highway & Transportation Dist.* (1979) 23 Cal.3d 180, 184–185 (*Doers*) [appellate courts will not reverse for procedural defects or erroneous rulings that could have been but were not challenged below].)

Boyd having submitted no evidence either of the falsity of the Paper's challenged statements or of respondents' actual malice—by affidavit, declaration, or their equivalent—he necessarily did not meet his burden of making a "prima facie factual showing" with competent, admissible evidence sufficient to sustain a favorable judgment on his defamation claim. (*Baral, supra*, 1 Cal.5th at p. 385; see pp. 384–386; *Sweetwater, supra*, 6 Cal.5th at p. 940.)

But even if we were to consider the attachments to the complaint as evidence tending to show that Insted was a properly sponsored "project" of "IEM" or the Institute of Environmental Management for purposes of non-profit

or tax-exempt section 501(c)3 treatment, that still would not make the Paper's targeted statements—that Boyd had falsely represented Insted itself as a tax-exempt section 501(c)3 organization—false or not substantially true. The " ' " ' "gist or sting" ' " ' " of the statements to an " ' "average reader" ' " of the Paper remains substantially true—that Insted is not a tax-exempt section 501(c)3 entity when Boyd had represented that it was. (*Edward, supra*, 72 Cal.App.5th at p. 790; *James v. San Jose Mercury News* (1993) 17 Cal.App.4th 1, 17 [statement suggesting plaintiff had committed illegal act, when it was actually committed by plaintiff's investigator, was substantially true; "[p]iercing through semantic hyper[-]technicality, we conclude the column's statement is essentially true and therefore will not support an action for libel"]; see also *Handelsman v. San Francisco Chronicle* (1970) 11 Cal.App.3d 381, 387–388 [newspaper's characterization of a complaint for civil conversion as an allegation of " 'outright theft' " was substantially true as fair reporting, though technically inaccurate if judged by a professional law reporter or trained lawyer].) What's more, Boyd's legal position about fiscal sponsorship of a project equating to section 501(c)3 status—asserted in his lawyer's post-publication retraction demand and the opinion memo from his lawyer—came to respondents only after the Paper's published statements. The relevant time for assessing a defamation claim is when the statement was made, not after. (*Sutter, supra,* 186 Cal.App.4th at p. 210.)

Further, nothing in Boyd's opposition countered the undisputed evidence about the Paper's extent and sources of investigation before its publications about Boyd and the absence of actual malice averred in the three moving declarations. While Boyd suggested in argument that the Paper had conducted no investigation or research, that its sources were unreliable, or that respondents had entertained doubts about the truth of their statements

concerning him and Insted, this was nothing more than factually unsupported and conclusory allegations, falling short of even circumstantial evidence of actual malice that may be considered to establish this element. There is also no evidence in the record of bias or ill will towards Boyd by respondents or anyone associated with them.

In sum, at the second step of the anti-SLAPP analysis, Boyd failed to meet his evidentiary burden of showing a prima facie case of defamation with competent, admissible evidence and the cause of action was properly stricken.[13]

IV. *Boyd's Emotional Distress Claims Were Properly Stricken*

Boyd's second cause of action for intentional infliction of emotional distress was premised on the same facts as his defamation claim—respondents' alleged malicious publication of the same knowingly false and defamatory information about him. The elements of a claim for the intentional infliction of emotional distress are extreme and outrageous conduct by defendants with the intention of causing, or reckless disregard of the probability of causing,

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[13] As part of the factual basis of his libel claim, Boyd's complaint alleged his exclusion from the candidate-debate forum held on September 20, 2018. The trial court ruled that even if true, this exclusion did not constitute a "statement," meaning a "publication" as used in Civil Code section 45 providing the definition of libel, and therefore could not amount to libel. In this, the trial court was correct, and on appeal, Boyd doesn't argue otherwise. But in his briefing, he contends that his exclusion from the forum and statements made about him during the debate were part of a "slander" claim. The complaint includes no cause of action for slander and there are no allegations of any statements made at the debate, about him or otherwise. There is certainly no evidence of this in the record. We accordingly disregard this argument in Boyd's brief, based as it is on matters outside the record.

Respondents also urged below and on appeal that some of Boyd's claims are barred as a matter of law by the one-year statute of limitations at section 340. In light of our determination that Boyd otherwise failed to make a prima facie showing sufficient to defeat the anti-SLAPP motion, we need not and do not address these statute-of-limitations issues.

emotional distress; severe or extreme emotional distress; and actual and proximate causation of the emotional distress by defendants' outrageous conduct. (*Belen, supra*, 65 Cal.App.5th at p. 1164, citing *Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) Conduct is considered outrageous when it is " 'so extreme as to exceed all bounds of that usually tolerated in a civilized [society]' " (*ibid.*) and is " 'of a nature which is especially calculated to cause, and does cause, mental distress.' " (*Cole v. Fair Oaks Fire Protection District* (1987) 43 Cal.3d 148, 155, fn. 7.)

But, as we have already determined, the Paper's published statements about Boyd, which he alleges were false and made with malice, were not prima facie shown to be false or substantially untrue, or made with actual malice.

As noted, Boyd's third cause of action is labeled "intentional infliction of mental and personal injury," which does not strike us as any different as a matter of law from a claim for intentional infliction of emotional distress. The added facts are the allegation of a known duty on the part of respondents to "live up to the public trust in the publication" and "a similar incident" in 2016 with some other unidentified candidate who was "humiliated and defamed[,] causing her to withdraw from the election." The cause of action alleges on "information and belief" that "Johnson engages in a malicious pattern of humiliating and defaming certain candidates based on unlawful profiling" during the Paper's endorsement interviews and the Paper's coverage of a school-board election. There are no facts in the record to support such a claim. And it is not clear what the "pattern" allegations add, as Boyd has no right of action in tort on behalf of someone other than himself and any conduct by Johnson that took place in 2016, whether cast as libel or intentional infliction of emotional distress, is beyond the applicable one-year statute of limitations. (See, § 340, subd. (c) [specifically applicable to libel and slander]; *Roman v.*

County of Los Angeles (2000) 85 Cal.App.4th 316, 323 [§ 340 one-year statute applicable to claims for intentional infliction of emotional distress].)

In any event, as the trial court concluded, "[w]hen claims for . . . emotional distress are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed. [Citations.]" (*Couch, supra*, 33 Cal.App.4th at p. 1504.) Boyd's emotional distress claims here are based on the same general factual allegations as his defamation claim, and they were accordingly dismissed as superfluous and thus lacking in merit as a matter of law. As discussed, the defamation claim was properly stricken under section 425.16 for the absence of a prima facie showing of merit at step two of the analysis, and the same is true for Boyd's emotional distress claims pleaded as the second and third causes of action, respectively.

V. *Claim That Anti-SLAPP Motion Not Timely Filed is Forfeited*

Finally, Boyd claims as error on appeal that respondents' anti-SLAPP motion was not timely filed in the trial court. He cites section 425.16, subdivision (f), which requires the motion to be filed within 60 days after service of the complaint, or later in the trial court's discretion. Subject to this discretion to permit a late filing, the defendant must move to strike a cause of action within 60 days of service of the *earliest* complaint that contains that cause of action, notwithstanding a later amendment alleging other matter. (*Starview Property, LLC v. Lee* (2019) 41 Cal.App.5th 203, 206; *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639–640, 643–646.) This claim of error is not cognizable or preserved on this record.

We can tell from the record that Boyd's amended complaint was filed on November 18, 2019, and that respondents' anti-SLAPP motion was filed on January 21, 2020. But the original complaint is not in the record; we therefore don't know what causes of action or claims it contained to ascertain whether

respondents' anti-SLAPP motion was timely. Nor do we know from the record when or if the original complaint was served to trigger any applicable deadline. And no proof of service of even the amended complaint appears in the record, so we lack any information from which to calculate when the anti-SLAPP motion was due under section 425.16, subdivision (f).

Further, the record does not show that Boyd ever objected in the trial court to a lack of timeliness of respondents' anti-SLAPP motion, or that the trial court made any ruling in this regard. Under these circumstances, the claimed error is not preserved and is forfeited on appeal. (*Doers, supra*, 23 Cal.3d at pp. 184–185; *K.C. Multimedia, Inc. v. Bank of America Technology & operations, Inc.* (2009) 171 Cal.App.4th 939, 950 [error forfeited on appeal by failing to raise or object to it below].)

DISPOSITION

The order granting respondents' anti-SLAPP motion is affirmed. Respondents are entitled to their costs on appeal. As prevailing defendants, respondents are also entitled to recover their attorney fees on appeal as a matter of right. (§ 425.16, subd. (c)(1); see *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461.) They may make the appropriate motions for attorney fees on appeal in the trial court.

_____
WILLIAMS, J.*

WE CONCUR:

_____
MANOUKIAN, ACTING P.J.

_____
GROVER, J.

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.